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IN THE

Supreme Court of the United States

October Term, 1968.

No. 373.

ALVIN H. FRANKEL, Guardian of the Estate of Nydia Pasceri, a Minor,

Respondent,

v.

JOHN H. TODD, JR., Defendant and Third-Party Plaintiff,

Petitioner,

and

GRAYSON MOORE, JR., Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No.

ALVIN H. FRANKEL, GUARDIAN OF THE ESTATE OF NYDIA PASCERI, A MINOR,

Respondent,

v.

JOHN H. TODD, JR., DEFENDANT AND THIRD-PARTY PLAINTIFF,

Petitioner,

and

GRAYSON MOORE, JR., THIRD-PARTY DEFENDANT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

John H. Todd, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on April 10, 1968.

REPORTS OF THE OPINIONS OF THE COURTS BELOW.

The first opinion of the United States Court of Appeals for the Third Circuit is reported at 377 F. 2d 553 (1967). It is appended to this Petition at page A-11. The second opinion of the United States Court of Appeals for the Third Circuit is reported at 393 F. 2d 435 (1968). This opinion is appended to this Petition at page A-1. The opinion of the District Court for the Eastern District of Pennsylvania is reported at 260 F. Supp. 772 (1966) and is appended to this Petition at page A-12.

JURISDICTION.

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit reversing the judgment of the United States District Court for the Eastern District of Pennsylvania was filed on April 10, 1968. A Petition for a rehearing before the Court *en banc* was denied on May 13, 1968.

The Jurisdiction of this Court is invoked pursuant to the provisions of the Act of June 25, 1948, 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

In an action in which jurisdiction is based upon diversity of citizenship, is the question of whether sufficient evidence has been adduced by the plaintiff on the issue of impaired earning capacity a matter of State or Federal law?

When a Court of Appeals affirms, *per curiam*, the decision of the trial Judge and then, ten months later, unanimously reverses its decision with no new facts or case law being presented to it, should not this Court exercise its powers of supervision under Rule 19(b) to review that action?

Does the record in this case raise a jury question under State or Federal law concerning the question of impaired earning capacity?

Does the decision of April 10, 1968 totally destroy the effect of the Standing Order of the United States District Court for the Eastern District of Pennsylvania adopted October 23, 1958 concerning the contents of Pre-trial Memoranda?

BASIS FOR FEDERAL JURISDICTION.

Federal jurisdiction over this case is based upon diversity of citizenship between the parties and an amount in controversy in excess of $10,000.00, 28 U. S. C. 1331.

STATEMENT OF THE CASE.

Petitioner seeks review of the judgment of the United States Court of Appeals for the Third Circuit which reversed the judgment of that same Court and ordered a new trial limited to the question of damages only.

The case was one in which jurisdiction was based upon diversity of citizenship between the non-resident guardian of the then minor plaintiff and the resident defendant who were involved in an automobile accident on May 13, 1961 in which minor plaintiff (then Nydia Pasceri) was riding as a passenger in an automobile operated by defendant (John H. Todd, Jr.). The case was tried before a Jury between May 26, 1966 and June 2, 1966, and the Jury returned a verdict for the plaintiff in the amount of $25,000.00. Plaintiff filed a Motion for a New Trial which was denied by the trial judge (Luongo, J.). His opinion on denial of the Motion is reported in 260 F. Supp. 772 (E. D. Pa. 1966).

Plaintiff appealed to the Court of Appeals and the first argument upon the appeal was held on May 27, 1967. The Court, consisting of Chief Judge Staley and Judges Kalodner and Freedman, filed an opinion on June 1, 1968 affirming Judge Luongo's opinion *per curiam*, at 377 F. 2d 553 (1967).

Plaintiff then filed a Petition for rehearing which was granted and a second argument was held on November 6, 1967. On April 10, 1968 the Court, in an opinion by Kalodner, J., "withdrew" its prior opinion, reversed the judgment of the District Court and granted a new trial limited to the issue of damages. A Petition for Rehearing before the Court *en banc* filed by the defendant was denied on May 13, 1968.

REASONS FOR ALLOWANCE OF THE WRIT.

The decision of the United States Court of Appeals for the Third Circuit filed April 10, 1968 has determined far reaching questions of both substantive and procedural law in the Third Circuit. Indeed, it has produced a conflict within the Circuit itself on the question of the sufficiency of evidence to be applied in a personal injury case. Further, it has rendered the opinions of the Third Circuit as virtually meaningless by the unanimous self-reversal. Finally, the effect of the Standing Order of the District Court concerning the contents of Pre-trial Memoranda has been abrogated.

1. Federal Versus State Standard for Sufficiency of Evidence.

In the case of *Dixon v. Pennsylvania Railroad Company*, 378 F. 2d 392 (C. A. 3, 1967) a signalman sustained a permanent leg injury and brought an action under the Federal Employers Liability Act. Plaintiff introduced evidence that it was necessary for him to climb in his job. No other evidence was introduced on the question of impairment of earning capacity. In holding that there was not sufficient evidence to have the issue of impairment of future earning capacity to be submitted to a jury, Judge Hastie said (Id. at p. 393, 394):

> "There was medical testimony that hemorrhaging within the calf at the time of the accident and subsequent absorption and reorganization within the injured area left a certain amount of scar tissue in the muscles. This condition, called fibrositis of the musculature, continued at the time of the trial, nearly three years after the accident. *There was no prospect of substantial change in this condition,* although exercise and the con-

tinuation of physio-therapy were recommended." (Emphasis added.)

• • •

"With this showing in the record, the trial judge, over the plaintiff's objection, instructed the jury that no award could be made for impairment of future earning capacity. At the same time, the Court made it clear that 'he is to be compensated for the pain that he incurs while he is working'. The Court also charged that 'everybody seems to agree that there was some disability' and that compensation is allowable for that. Thus, only the question of future impairment of earning power was eliminated from jury consideration."

• • •

"On this record we think that the jury could not rationally have found it more probable than not that the appellant's climbing ability was substantially impaired or that he could not satisfactorily perform all normal duties of a signalman. Of course, the plaintiff bore the burden of proof on this issue. And although it is sometimes said that a jury has a 'measure of speculation' in arriving at a verdict or an award of damages, *Lavender v. Kurn*, 1946, 327 U. S. 645, 653, sheer conjecture cannot be the basis of a jury finding. *Sleek v. J. C. Penney*, 3d Cir., 1963, 325 F. 2d 2. Here, the jury would at best only be able to hazard a guess, rather than draw a logical inference, from the evidence as to appellant's present and future ability to climb. Cf. *Wiles v. New York, Chicago and St. Louis Railroad Co.*, 3d Cir. 1960, 283 F. 2d 328, cert. denied, 364 U. S. 900; *Bochar v. J. B. Martin Motors, Inc.*, 1953, 374 Pa. 240, 97 A. 2d 813. In these circumstances, the court properly refused to permit what would have been an entirely conjectural finding on impairment of future

earning power in favor of the party bearing the burden of proof on this issue."

When the *Dixon* case was cited to the Court verbally during the argument of the present appeal, the Court dismissed the authority by commenting that it was not significant because "it was an F. E. L. A. case."

This Court has held in *Simler v. Conner,* 372 U. S. 221 (1963) that "the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions". (Id. at 222). Whether or not a particular issue can be submitted to a jury in a diversity action is also a matter of Federal law. The Court of Appeals, then, has totally disregarded the holding in *Simler,* by failing and refusing to consider Federal law as it relates to the sufficiency of evidence, especially when the *Dixon* case is directly on point and holds contrary to the opinion of April 10, 1968.

2. Power of Supervision Under Rule 19(b).

Following the publication of the original opinion of the Court of Appeals, plaintiff filed a Petition for Rehearing. At that time and later upon the argument, plaintiff submitted no new facts, new cases or arguments that were not originally presented to the Court at the first argument. The Court's latest opinion does not recite any decisions by the Pennsylvania Courts or the Federal Courts commanding a unanimous self-reversal on the same case within a span of 10 months. The obvious conclusion is that the three judges changed their minds between the first and second opinions based on the *same facts and law.* This kind of action suggests that no opinion is inviolate and that without any new facts or recent decisions being advanced to the Court, this precedent alone is sufficient to justify a Petition for Rehearing by the same Court since the judges might well change

their minds by the time they have heard a second argument several months later.

This Court, under Rule 19(b), has the general power of supervision over subordinate federal courts and it is submitted that the Writ of Certiorari should be granted to consider the propriety of the action of the Court of Appeals in this case.

3. The Court's Opinion Erroneously States the Law of Pennsylvania.

The trial judge filed a comprehensive opinion discussing the points raised in the Motion for New Trial (260 F. Supp. 772). The sole basis for reversing the action of the lower Court advanced in Judge Kalodner's opinion is that the trial judge erred in refusing to submit to the jury the question of impaired earning power. Judge Kalodner's opinion rests on the following statement:

> "It is setfled Pennsylvania law that where there is evidence that a plaintiff has suffered disabling permanent injury, it is a jury question as to whether such injury will 'shorten' his 'economic horizon' and thereby result in a future loss of earning power."

Judge Kalodner's error in misstating the law of Pennsylvania is underlined by his further statement that "the cases" cited in the lower court's opinion "afford no nourishment" to the contrary view.

The *one* case cited by the trial court on this point is the *only* Pennsylvania case squarely on point. In *Kmiotek v. Anast,* 350 Pa. 593, 39 A. 2d 923 (1944), the plaintiff, a railroad worker, had injuries which caused him to suffer headaches four times a week and also spells of dizziness (Id. at p. 597). A physician testified that the injury "interfered with the man's earning capacity" (Id. at p. 598). After reviewing the above evidence the Court said:

> *"While the record would support a finding of permanent injury, that is not equivalent to a finding that earning power is impaired.* Plaintiff had the burden of proof but the evidence was not sufficient to permit the jury to include that element of damage in its verdict; it would have been mere guesswork. 'Loss of earning power is only one of the elements of damage in cases of personal injury, but it is an element which must be fairly proved before an allowance can be made therefor' *Helmstetter v. Pittsburgh Rwy. Co.*, 243 Pa. 422, 425, 90 A. 203." (Emphasis added.)

The *Kmiotek* case has never been overruled or distinguished. The holding that proof of a permanent injury is not proof that earning power is impaired has never been controverted in any case in Pennsylvania.

The fact that Judge Kalodner failed to discuss or mention the *Kmiotek* case except to suggest that the "cases" relied on by the trial judge held contrary to the above quoted portion is surprising enough but when the lower court's opinion rests squarely on this decision the omission and misinterpretation is shocking.

What Judge Kalodner's opinion does attempt to do is take several Pennsylvania cases such as *Messer v. Beighley*, 409 Pa. 551 (1963); *Saganowich v. Hackikian*, 348 Pa. 313 (1944); *Philadelphia v. Philadelphia Transportation Company*, 400 Pa. 315; *Bochar v. J. B. Martin Motors, Inc.*, 374 Pa. 240 (1953) and *Herb v. Hallowell*, 304 Pa. 128 (1931) and by quoting obiter dicta from these cases suggest an overruling of the square holding of the *Kmiotek* case.

First of all, the *Saganowich* and *Herb* cases are obviously of no value in supporting the Court's holding. Even if they held as Judge Kalodner suggests, they were decided before the *Kmiotek* case.

In the *Messer* case the Court did not hold as Judge Kalodner's opinion says it does. The specific point before the Court was whether or not medical evidence of a "chronic" or "recurrent" evidence of injury was sufficient to establish a permanent injury. The Court held it did not and awarded a new trial. The Court said in dicta "It is clear from the evidence that impairment of future earning capacity should have been submitted as a jury issue." Obviously the Court did not mean that mere proof of a permanent injury was sufficient to have the issue submitted because it had just ordered a new trial on the ground that the evidence did *not* establish a permanent injury. The Court referred clearly to other evidence, not recited in the opinion, which justified the submission of the question to the jury.

In the *P. T. C.* case relied on by Judge Kalodner there was direct evidence that when plaintiff attempted to perform his regular duties as a policeman he was compelled to be absent from work for three or four days a week. He was prevented from working at his regular duties on emergency police wagons for this reason. The jury had therefore *specific* and *definite* evidence of how his injuries impaired his earning capacity.

Likewise in the *Bochar* case plaintiff introduced evidence that he was unable to work overtime and on Sundays as a result of his injuries. The evidence also showed he had lost $1,260 in pay for this work up to the time of trial. Again the jury had sufficient evidence of specific losses capable of being projected into the future.

Such evidence is completely lacking in this case.

None of the cases overruled the rule of the *Kmiotek* case. None needed to distinguish the case because the *Kmiotek* case and the cases relied on by Judge Kalodner were patently distinguishable and their holdings consistent with the *Kmiotek* case.

The point overlooked by Judge Kalodner is that the evidence in the cases mentioned in his opinion and the evidence in this case is clearly distinguishable.

Since all of the above cases were before the Court at the first argument it is completely impossible to determine how the same Court misinterpreted the cases in its first decision when Judge Kalodner now uses them to prove his statement that they show "settled Pennsylvania law . . ." The only *settled*, unreversed, unqualified statement of the law is the *Kmiotek* decision which is contrary to the Court's and is completely ignored by it.

The absence in the Court's second opinion of an explanation as to how the law of Pennsylvania which was so "settled" at the time the second opinion was filed—and chronologically—was as "settled" at the time of the first opinion, was suddenly recognized several months later, deserves the attention of this Court.

Aside from the decided cases on point the Court completely overlooks the fact that other standards of proof of impairment of earning capacity are missing from the plaintiff's case, e.g., the usual proof of life expectancy necessary for a jury to fully evaluate impairment of future earning capacity was never introduced into the record, nor was there any attempt to establish "present worth". Cf. 11 *Pennsylvania Law Encyclopedia, Damages,* Sec. 55. In short, all the jury would have had before it was proof of a permanent injury (pelvic injuries). Completely conjectural was whether this would involve future lost earnings, how much and for how long.

4. The Court's Decision Negatives the Local Rules of Court.

The Standing Order of the Eastern District Court of Pennsylvania adopted October 23, 1958 provides, as regards Pre-Trial Memoranda, inter alia:

"Plaintiff's pre-trial memorandum shall contain the following:

* * *

B. A brief description of the damages claimed and the basis thereof. In personal injury cases as to each injured plaintiff there should be included a brief summary statement of

* * *

(d) a summary of the special monetary damages to include a detailed statement of loss of earnings to date and a detailed statement as to the loss from future impairment of earning . . . ."

Plaintiff's Pre-Trial Memorandum in this case did not set forth any claim for future lost earnings or impairment of future earning capacity. No attempt to amend the Memorandum was made prior to or at trial to allege such damages.

The Court of Appeals for the Third Circuit has recognized the importance of the local rules relating to Pre-Trial Memoranda in the case of *Payne v. S. S. Nabob, et al.*, 302 F. 2d 803 (C. A. 3, 1962) and fully discussed therein the reasons why the local standing order would be upheld.

If, in this case, the opinion of the Court of Appeals of April 10, 1968 is permitted to stand, it would emasculate the effect of the local standing order of the District Court on Pre-Trial Memoranda and reverse the effect of the decision in the *Payne* case.

While Judge Luongo did not rest his refusal to charge on impairment of earning capacity on the omission of this item from plaintiff's Pre-Trial Memorandum as he well might have done in accordance with the Court's ruling in the *Payne* case, the fact that he did on another more obvious ground does not alter the fact that the precedent of this case will completely destroy the intent and purpose of the

local standing order and the thrust of the opinion in the *Payne* case.

It is submitted that the failure of the Court to discuss this point—which was orally argued—or to consider the effect of its decision on the standing order in the light of the *Payne* case should be considered by this Court because of its broad effect on rules relating to Pre-Trial Memoranda.

CONCLUSION.

For all of the foregoing reasons, petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16364

ALVIN H. FRANKEL, ESQUIRE, GUARDIAN OF THE ESTATE OF NYDIA PASCERI, A MINOR,
Appellant

v.

JOHN H. TODD, JR.

v.

GRAYSON MOORE, JR.,
A Third-Party Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 22, 1967

Re-argued November 6, 1967

Before STALEY, *Chief Judge,* KALODNER and FREEDMAN, *Circuit Judges*

OPINION ON REHEARING

(Filed April 10, 1968)

By KALODNER, *Circuit Judge*

The critical question presented,[1] is whether, at the trial of the minor plaintiff's personal injury action, the District Court erred in refusing, in the light of her undisputed disabling permanent injury, to submit to the jury, as an item of damages, the issue of impaired earning capacity.

Since jurisdiction is based on diversity of citizenship and the accident which led to this action occurred in Pennsylvania the law of that Commonwealth applies.

Necessary to our disposition of the stated question are these facts:

On May 13, 1961, the minor plaintiff, then 19 years old and a student at a teachers' college, was a passenger in defendant's automobile when it ran off the road and plunged over an embankment. She sustained serious injuries, which, as the District Court charged the jury, included a cerebral concussion, ruptured bladder, damage to other internal organs, and numerous fractures of the pelvic bones which resulted in a tilting of her right hip; the crest of the right hip is approximately one inch higher than the left, resulting in a limping gait.

The District Court in its charge to the jury stated that "There has been no dispute . . . as to the fractures and certain damage to the bladder and other internal organs. . . ." and further instructed the jury as follows:

> "You should, therefore, accept the testimony that, in fact, Miss Pasceri [the minor plaintiff] had fractures to the pelvis, that the fractures have resulted in a de-

1. Plaintiff appealed from a judgment in her favor of $25,000 entered pursuant to the jury's verdict, contending that it was grossly inadequate due to the District Court's erroneous trial rulings in excluding evidence, and its refusal to permit the jury to consider the plaintiff's future loss of earnings as an item of damage. We affirmed Per Curiam, 377 F. 2d 553 (1967), and thereafter granted the plaintiff's petition for rehearing.

formity to the hip, that they have caused a limp, that that condition is permanent, that it cannot be corrected, except by an operation which, at least one of the doctors testified, was a very serious one and whose likelihood of success was so small that he would not recommend such an operation."

Prior to the District Court's charge to the jury it refused to instruct it, as requested by plaintiff's counsel, that "Miss Pasceri would also be entitled to recover a sum representing the extent to which you may find her earning power to have been impaired by reason of her injuries."

In denying the requested instruction the District Court said (pp. 649-650 N. T.)

"Perhaps evidence might have been adduced on this score, but I feel, under the circumstances, I cannot permit the jury to speculate as to the effect that a distorted hip will have on Miss Pasceri's abilities in the future to earn money".

On the score of the requested instruction and the District Court's ruling with respect thereto, it must be noted that (1) plaintiff testified that her head injuries left her with headaches, dizziness, ringing in her ears, and blurring of vision which limits her reading both at school and at home; her hip injury is painful and exhausting; it hampers her in getting about and "slows me down quite a bit"; and (2) plaintiff adduced medical testimony that her sacroiliac joint had suffered serious injury with resulting permanent arthritis creating stress and strain in walking and standing which will get progressively worse and more painful; and plaintiff's back will be permanently painful.

In its Opinion, reported at 260 F. Supp. 772 (E. D. Pa. 1966), denying the plaintiff's motion for a new trial, based *inter alia,* on refusal to submit to the jury as an item of

possible damage her impairment of earning power, the District Court, after noting that the plaintiff had been able to complete her college studies after a 7-week hospitalization period, and that from the time of her graduation until the trial in 1966 she had been employed full time as an elementary school teacher, said in relevant part, at page 775:

> "She has not been disabled in the performance of any of her duties, although, as she stated, she has been inconvenienced by the hip deformity in that she is slowed down somewhat in getting around the room to help the children and her back aches and causes her discomfort. One of her medical witnesses testified that if she does not wear a lift in the right shoe, as time goes on the uneven strain on the back muscles will cause the pain in the low back to remain. There was no medical testimony that, even without a lift in the shoe, the pain in the low back would at any time in the future increase to a degree which would interfere with the performance of Miss Pasceri's duties as a teacher. She was, at the time of trial, performing and apparently will be able to continue to perform in the future, full time duty as a teacher, although perhaps with some discomfort. Beyond that, Miss Pasceri is relatively small in stature, standing just under five feet tall and weighing less than ninety pounds. Plaintiff presented no evidence from which the jury could properly conclude that Miss Pasceri's hip deformity will restrict her ability to perform other types of work which, considering her age, physical characteristics, education and training, she would have been likely to do, but for the injury, for the rest of her life. See Restatement, Torts § 924 comment (d) (1939). It is plaintiff's burden to establish impairment of earning capacity by a preponderance of the evidence. The

proof on that issue was so lacking here that the jury would have been left entirely to guess and speculation to find and assess such impairment. This would have been improper. See Kmiotek v. Anast, 350 Pa. 593, 39 A.2d 923 (1944) and cases therein cited."

The cases cited in the District Court's Opinion afford no nourishment to its view that it was not required to submit to the jury, as an item of damage, the issue as to possible impairment of earning power in the instant case.

It is settled Pennsylvania law that where there is evidence that a plaintiff has suffered disabling permanent injury, it is a jury question as to whether such injury will "shorten" his "economic horizon" and thereby result in a future loss of earning power.

In Messer v. Beighley, 409 Pa. 551 (1963) it was held that the trial judge erred in failing to submit to the jury, as an item of damages, the question as to impairment of future earning power in view of the testimony that the accident had aggravated the plaintiff's congenital preexisting defect in the lumbosacral region of the spine.

After noting (at page 554) that the plaintiff's only medical witness had not described the plaintiff's injury as "permanent" but had only referred to it as "chronic" with "recurrent" episodes of pain, and that the word "'chronic' signifies continuing for a long time, deep-seated and obstinate or characterized by slowly progressive symptoms", the Court said at page 555:

"It is also noted that *no instructions* were given by the trial judge that the plaintiff could recover for loss or impairment of future earning power. *This was error.* It is clear from the evidence that *this element of damage should have been submitted for the jury's consideration,* be it permanent or merely extending for

a period of time in the future. The mere fact that an injured person continues to work at his employment without diminution of wages does not preclude recovery for impairment of earning power, *if he is in fact disabled:* Holton v. Gibson, 402 Pa. 37, 166 A.2d 4 (1960), and Laymann v. Doernte, 405 Pa. 355, 175 A. 2d 530 (1961)." (Emphasis supplied.)

Again, in Saganowich v. Hachikian, 348 Pa. 313 (1944) it was squarely ruled that where there is a permanent disabling injury the question of impairment of earning power must be submitted to the jury. There the plaintiff lost his sight in one eye in an accident. Evidence was adduced at the trial that his earnings were higher at that time than before the accident. The trial judge submitted to the jury impairment of earning power as an element of damage. On the appeal from the jury's verdict allowing damages to the plaintiff, the defendant assigned this submission to the jury as error.

In disposing of this contention the Court stated at page 316:

"Appellant also contends that it was error to permit the jury to consider future loss of earning capacity as an element of damages, since the injured plaintiff was making more money at the time of the trial than at the date of the accident. We cannot agree with this contention. Damages for loss of *earning capacity* arise out of an impairment of that capacity, and not out of loss of *earnings*. The earnings of the plaintiff subsequent to the injury, as compared with his earnings at the time of the injury, are merely evidence, but not conclusive evidence, as to whether his earning power has been diminished by the accident. *The matter was clearly for the jury . . .*" (The emphasis as to this last statement is supplied).

The Pennsylvania Supreme Court has ruled, time and again, that the circumstance that a plaintiff's earnings are higher after his injury than before it, is not a bar to recovery of damages for impairment of earning power, where impairment is of disabling effect.

In Philadelphia v. Philadelphia Transportation Company, 400 Pa. 315 (1960), a policeman suffered a shortening of his leg in an accident. Following his convalescence he returned to his duties as a policeman but was not permitted to work on emergency police wagons because he couldn't "run" nor "lift somebody". In finding an impairment of earning power, notwithstanding the fact that the plaintiff had received an increase in pay on his return to work, the Court said (p. 323):

> "A policeman who is unable to move rapidly on his feet certainly has had his earning power impaired. The defendant points out that the plaintiff received an increase in salary since the accident, but this, of itself, is not conclusive proof of extent of earning power".

In the leading case of Bochar v. J. B. Martin Motors, Inc., 374 Pa. 240 (1953) the plaintiff, a telephone repairman, suffered permanent limitation of motion of the knee which prevented return to his former duties but did not prevent his employment at a desk job without reduction in his earnings. In disposing of the defendant's contention "that there was no evidence of impairment of earning power" because the fact that plaintiff's "wages were higher after the accident than before proves no deterioration of earning ability", the Court said at pages 244-245:

> "A tortfeasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, the wages of the injured person fol-

lowing the accident are as high or even higher than they were prior to the accident. Parity of wages may show lack of impairment of earning power if it confirms other physical data that the injured person has completely recovered from his injuries. Standing alone, however, parity of wages is inconclusive. The office worker, who loses a leg has obviously had his earning ability impaired even though he can still sit at a desk and punch a comptometer as vigorously as before. *It is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injuries sustained as the result of the tortfeasor's negligence? That is the test.* And it is no answer to that test to say that there are just as many dollars in the patient's pay envelope now as prior to his accident. *The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages.*" (Emphasis supplied.)

This Court cited and applied the Pennsylvania rule as laid down in *Bochar*, in Wiles v. New York, Chicago and St. Louis Railroad Company, 283 F. 2d 328 (1960). There the jury awarded the plaintiff, who had suffered serious back injuries, $20,000 for loss of earning power, and the District Court set the award aside on the ground that it was "too speculative", and "[t]here is a complete absence of evidentiary facts on which the jury could intelligently assess the monetary difference between what plaintiff would have been able to earn in the future had he not been injured and what he will be able to earn in his physical condition during his work-life expectancy."

In reversing the District Court's disallowance of the $20,000 award for impairment of earning power, we said in relevant part at page 332:

> "Certainly, Wiles' economic horizons have been limited by his injury. See Bochar v. J. B. Martin Motors, Inc., 1953, 374 Pa. 240, 97 A. 2d 813. . . . we cannot say that there was a significantly larger element of speculation in arriving at an estimate of Wiles' loss of future earnings than there would be in any ordinary instance requiring an estimate of damages by a jury. Since none of us is capable of foreseeing the future with any substantial degree of certainty every estimate of damages must contain elements of speculation."

Of dispositive significance here is the fact that in Herb v. Hallowell, 304 Pa. 128 (1931), it was held that the trial court correctly submitted the issue of impairment of earning power where a 44-year-old school teacher suffered head injuries in an accident with subsequently prevailing "dizziness, headaches and nausea". There the plaintiff had returned to his teaching employment following his convalescence.

In the instant case there was also "headaches, dizziness, ringing in the ears and blurring of vision" flowing from the plaintiff's head injury, *plus* the permanent pelvic fractures with resulting hip deformity and "limping gait".

The jury, on submission of the issue of loss of earning power as an element of damages, could have found that disabling permanent injuries were suffered by the plaintiff, and in considering the plaintiff's "whole span of life" could have determined that her "economic horizon" had been "shortened" with impairing consequence as to future earning power.

It requires no great stretch of the imagination to conclude that in the instant case it might well transpire that

the plaintiff will have to give up her teaching employment because of her disabling injuries and that she might be compelled to accept employment at a lesser compensation, and that the jury could have so found. Further, the jury could have justifiably found that at the minimum the plaintiff's opportunities for advancement in the teaching profession have been diminished by her disability.

What has been said makes it unnecessary for us to reach the other points presented on this appeal with respect to challenged trial rulings of the District Court.

For the reasons stated our prior opinion of June 1, 1967 will be withdrawn, and the Judgment entered below pursuant to the jury's verdict will be reversed and the cause remanded to the District Court with directions to grant a new trial limited to the issue of damages, in accordance with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16364.

ALVIN H. FRANKEL, GUARDIAN OF THE ESTATE OF NYDIA PASCERI, A MINOR,

Appellant,

v.

JOHN H. TODD, JR.

v.

GRAYSON MOORE, JR., THIRD-PARTY DEFENDANT.

Before STALEY, *Chief Judge,* and KALODNER and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

PER CURIAM:

On review of the record we find no error. The judgment in favor of the plaintiff and against the defendant, John H. Todd, Jr., entered June 2, 1966 pursuant to the jury's verdict, will be affirmed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIV. A. No. 31985.

ALVIN H. FRANKEL, GUARDIAN OF THE ESTATE OF NYDIA PASCERI, A MINOR

v.

JOHN H. TODD, JR., AND GRAYSON MOORE, JR.

October 25, 1966.

OPINION

LUONGO, *District Judge.*

On May 13, 1961, Nydia Pasceri, 19 years of age, was a passenger in an automobile operated by defendant when it ran off the road and plunged over an embankment. Miss Pasceri sustained serious injuries including a fractured pelvis and a ruptured bladder. An out-of-state guardian was duly appointed for the minor and suit was instituted in this court based on the resultant diversity of citizenship. The case was tried in May 1966, and the jury returned a verdict in the amount of $25,000 in favor of the guardian. Dissatisfied with the size of the verdict, the guardian seeks a new trial and urges, as grounds, that:

1. The Court erred in refusing to submit to the jury impairment of earning capacity as an element of damage.

2. The Court abused its discretion in refusing to postpone the trial.

3. The Court erred in refusing to permit plaintiff to present testimony as to a certain claimed disability resulting from injuries sustained in the accident.

4. The Court erred in refusing to allow the guardian to recover medical and hospital expenses.

5. The verdict was inadequate.

Each of the grounds has been considered carefully and will be discussed briefly. Since all lack merit the motion for new trial will be denied.

1. *Impairment of Earning Capacity.*

Among the injuries sustained by Miss Pasceri were fractures of several of the pelvic bones. The healing of the fractures resulted in a distortion of the pelvic ring, shifting the right side upward leaving the crest of the right hip approximately one-half inch [1] higher than the left. The deformity of the hip is permanent and cannot be corrected.

In essence, it is plaintiff's contention that proof of permanent injury, without more, requires submission of impairment of earning power to the jury. The cases he has cited hold only that, even in the absence of actual loss of earnings, the injury and the resultant disabilities may nevertheless establish impairment of earning power for which the injured person is entitled to be compensated.

Thus, in Bochar v. J. B. Martin Motors, Inc., 374 Pa. 240, 97 A. 2d 813 (1953), the injured person was a telephone repairman with a permanent 25-30% limitation of motion of the knee. There was evidence that when he returned to

1. In addition there was testimony that the bones of the right leg were approximately 5/16" shorter than the bones of the left. Plaintiff's medical testimony as to the cause of the shortening of the bones was conflicting, one of plaintiff's medical witnesses testified that the condition was unrelated to the accident; another that it was caused by the accident.

his employment he was unable, because of his semi-frozen knee, to perform his duties fully, and that in an important part of his work, tracing "stuck" calls, he was able to do only one-half the amount of work performed by the average man in the industry because of the amount of bending required. There was also evidence of specific loss from inability to do overtime work. On that proof it was held proper to permit the jury to consider whether his economic horizons had been shortened because of the injuries.

To the same effect: Holton v. Gibson, 402 Pa. 37, 166 A. 2d 4 (1960) where evidence of permanent skull injury causing severe headaches and memory deficiency; leg injury causing pain upon prolonged standing; inability to perform former duties as a guard; and inability to drive an automobile were held to be sufficient evidence of limitation of economic horizons for submission of impairment of earning power to the jury, notwithstanding higher earnings after the accident; and City of Philadelphia v. Philadelphia Transportation Co., 400 Pa. 315, 162 A. 2d 222 (1960), in which permanent injury to a policeman's legs, making it impossible for him to run and interfering with his ability to lift (precluding assignment to duty on an emergency patrol wagon), was held sufficient evidence of inability to perform duties to warrant submission of the issue of impairment of earning power to the jury.

A further illustration of the same principle is found in Yeager v. Anthracite Brewing Co., 259 Pa. 123, 102 A. 418 (1917), in which plaintiff, an engineer in a brewery, as part of his duties was required to perform certain physical tasks. The accident in question caused tearing of the muscles and muscle fibres of his arm causing severe and permanent injury to it. Although plaintiff's earnings after the accident were the same as before, there was evidence that his strength was substantially impaired and he was permanently unable to do as much or as heavy physical labor as

he had been able to do before the accident. It was held that the jury could find from that evidence that plaintiff could be compelled in the future to accept less remunerative employment than if he had not been injured.

There was no comparable proof in this case. When this accident happened, Miss Pasceri was a student at East Stroudsburg State Teachers College. Despite seven weeks hospitalization she was able to graduate in the normal time. From the time of graduation until the time of trial she had been employed full time as an elementary school teacher. She has not been disabled in the performance of any of her duties, although, as she stated, she has been inconvenienced by the hip deformity in that she is slowed down somewhat in getting around the room to help the children and her back aches and causes her discomfort. One of her medical witnesses testified that if she does not wear a lift in the right shoe, as times goes on the uneven strain on the back muscles will cause the pain in the low back to remain. There was no medical testimony that, even without a lift in the shoe, the pain in the low back would at any time in the future increase to a degree which would interfere with the performance of Miss Pasceri's duties as a teacher. She was, at the time of trial, performing and apparently will be able to continue to perform in the future, full time duty as a teacher, although perhaps with some discomfort. Beyond that, Miss Pasceri is relatively small in stature, standing just under five feet tall and weighing less than ninety pounds. Plaintiff presented no evidence from which the jury could properly conclude that Miss Pasceri's hip deformity will restrict her ability to perform other types of work which, considering her age, physical characteristics, education and training, she would have been likely to do, but for the injury, for the rest of her life. See Restatement, Torts § 924, comment (d) (1939). It is plaintiff's burden to establish impairment of

earning capacity by a preponderance of the evidence. The proof on that issue was so lacking here that the jury would have been left entirely to guess and speculation to find and assess such impairment. This would have been improper. See *Kmiotek v. Anast*, 350 Pa. 593, 39 A. 2d 923 (1944) and cases therein cited.

2. *Abuse of Discretion in Refusal to Postpone Trial.*

As earlier noted, the accident happened May 13, 1961. The case was called for trial and a jury selected late in the afternoon of May 25, 1966. Following the selection of the jury, counsel met with the trial judge in chambers. There was a lengthy discussion of the case during which settlement was discussed, but unsuccessfully. The meeting lasted until about 5:30 p.m. On that evening plaintiff's counsel apparently had Miss Pasceri examined by a neurologist and, on the morning of May 26, counsel reported that the neurologist "left word this morning with my office that this girl has a severe postconcussional picture, which is the result of a contusion of the brain, rather than a concussion, and that she needs extensive medical care in that respect." (N. T. 4) Counsel thereupon made application for a postponement of the trial until the fall to permit full exploration of alleged organic brain damage which had not theretofore been claimed, mentioned or suggested. Until then, in pleadings, in pretrial discovery and in the pretrial memorandum, plaintiff had described Miss Pasceri's injuries as a ruptured gall bladder and fractures of the pelvis with permanent hip deformity such as to interfere with and probably prevent childbirth and that Miss Pasceri had been advised that she would not be able to give a normal childbirth. In an amended pretrial memorandum filed on February 14, 1966, the day the pretrial conference was held, there was an intimation of possible emotional involvement when plaintiff

listed as a witness "An expert psychiatrist to be named later." On that same date a Pretrial Order was entered which, inter alia, granted permission to defendant to have Miss Pasceri examined within thirty days from the date of the order. No psychiatrist was ever named by plaintiff and, as a consequence, defendant did not have Miss Pasceri examined by a psychiatrist.

Viewed against this background the request for postponement to pursue a completely new claim, brain damage, came entirely too late and was unreasonable. There were no new or unforeseen developments. The severity of the impact, the nature of the injuries sustained, and the symptoms, such as they were, had been known and had remained fairly constant over the period of five years during which Miss Pasceri was undergoing examination by many specialists in preparation for trial.[2] No reason appears why the brain damage, if it existed, had not been discovered and disclosed prior to trial. To have granted the request for postponement under such circumstances would have constituted an abuse of discretion.

3. *Refusal to Permit Testimony as to Inability to Conceive.*

Plaintiff contends in his brief that the court excluded testimony relating to Miss Pasceri's inability to carry a fetus through a normal nine months pregnancy as well as testimony indicating inability to conceive at all. There is no question that testimony relating to the former was admitted (e.g., see N. T. 294) and in fact, at counsel's request, that matter was specifically brought to the jury's attention before the jury retired to deliberate after the charge. (N. T. 674-75). This discussion will be limited, therefore, to the propriety of exclusion of testimony dealing with inability to conceive.

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2. She has received no medical treatment for any condition since the summer of 1961.

There were only two references to child bearing in plaintiff's pretrial memorandum filed more than four and one-half years after the accident: Under "Principal Injury," following a fairly detailed description of the injury to the pelvis, plaintiff stated "The crushing type injuries to the pelvic area will interfere with and probably prevent childbirth;" and under "Present Disability," after a recitation of difficulties in walking, plaintiff stated "Minor plaintiff, who is single, has been told by competent medical authorities that because of her injuries she will not be able to give a normal childbirth." Plaintiff contends that by the use of the term "childbirth" in those two sentences he gave adequate pretrial notice of the claim that, as a result of the injuries sustained in the accident, the minor plaintiff would be incapable of conceiving a child.

It appears rather clearly that the claim of inability to conceive was an after thought, much as the claim of brain damage was. By agreement there had been full exchange of medical reports prior to trial. Miss Pasceri had been examined over a period of several years by specialists on both sides in the fields of gynecology, obstetrics, x-ray, orthopedics and urology. In the reports which were exchanged no mention had ever been made as to inability to conceive. From the medical reports it could only be concluded that plaintiff's references to childbirth in the pretrial memorandum related to inability to give natural birth or, at most, inability to carry a fetus full term, and not to inability to conceive. This is the fair meaning of the language used in the pretrial memorandum, and that meaning is borne out by the contents of the pretrial medical reports.

Pretrial conferences are held in this District under Standing Order dated October 23, 1958 pursuant to Rules 16 and 83 F. R. Civ. P. Under that Order plaintiff is required to set forth in writing, inter alia, the principal in-

juries sustained and the disabilities resulting therefrom. Matters not so revealed must be excluded if the pretrial procedures are to retain vitality and unity. In Payne v. S. S. Nabob, 302 F. 2d 803 (3d Cir.), cert. denied, 371 U. S. 870, 83 S. Ct. 136, 9 L. Ed. 2d 107 (1962), the Court of Appeals for this Circuit Considered that Standing Order. The language used in approving the policy underlying the Order is applicable here and clearly supports the exclusion of the proffered testimony:

> "It has long been the law that attorneys at the pretrial stage 'owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be.' [Citations omitted.] It is through such disclosure at pretrial that trial prejudice can be avoided.
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> "It is argued also that the court abused its discretion by refusing to permit amendment of the pretrial memorandum. This was not an easy decision for the trial judge. His inclination clearly, as is habitual with judges, was to help. And help he would have if, in his opinion, he could have done so fairly. But he was confronted with the realization that if he granted the request or allowed a continuance of the trial he was repudiating the whole pretrial theory and system as understood and followed in the Eastern District at a crucial period of its existence. Pretrial was finally on a firm foundation there. The judges had all given it generous and complete attention. This, with the gradual realization of the bar that pretrial was here to stay as a vital element of litigation practice and its resultant full cooperation, had made pretrial procedure routine in the Eastern District. One consequence was that directly and indirectly enormous relief was given

> the badly clogged trial list. It was admittedly vitally important to make sure that pretrial procedure would continue to function properly. One necessary phase of attaining that objective was, as expressed by the trial judge, 'We have come to the point of enforcing it very strictly.' In the circumstances he considered himself obliged to deny the motions to amend the pretrial memorandum with respect to liability, allegations and witnesses. The refusal of appellant's motion for a continuance is in the same category." 302 F. 2d at 807.

See also Wiggins v. City of Philadelphia, 331 F. 2d 521, 526 (3rd Cir. 1964); Wirtz v. Hooper-Holmes Bureau, Inc., 327 F. 2d 939 (5th Cir. 1964); Padovani v. Bruchhausen, 293 F. 2d 546 (2d Cir. 1961).

4. *Medical Expenses.*

Plaintiff's next claim is that the court erred in refusing to permit the guardian to recover the medical expenses incurred by the minor's parents in the treatment of Miss Pasceri's injuries during her minority. That this cause of action under Pennsylvania law belongs to the parent [3] and not to the guardian, appears to be well settled by In re Mikasinovich, 110 Pa. Super. 252, 260-261, 168 A. 506 (1933) and Johnstone v. O'Connor & Co., 164 F. Supp. 66, 67-68 (E. D. Pa. 1958). See Brough v. Strathmann Supply Co., 358 F. 2d 374, 378 (3d Cir. 1966). The guardian made no attempt to recover the medical expenses for the parent; he attempted to recover them for the minor's estate. On that basis alone, Wilson v. American Chain and Cable Co., Inc., 364 F. 2d 558 (3d Cir. 1966) is inapposite. *Wilson* was a suit by a parent both as natural guardian for the minor and in the parent's own right. It was held there

3. The parent in fact instituted suit in the state court for such damages.

that, although the parent's separate claim was lacking in jurisdictional amount, it could be entertained under the doctrine of pendent jurisdiction as ancillary to the claim on behalf of the minor. Significantly there was diversity of citizenship between the parent and the defendant. Since the guardian here made no attempt to recover for the parent, it is not necessary to consider the interesting question whether the doctrine of pendent jurisdiction should be further extended to entertain the parent's separate claim where, as here, a guardian was appointed for the minor for the sole and admitted purpose of creating diversity jurisdiction.

Notwithstanding the ruling that the guardian would not be permitted to recover medical expenses, counsel requested permission to bring to the jury's attention the amount of the hospital bill for the limited purpose of bearing out the extensiveness of the care and treatment the minor received during her stay there. The custodian of the hospital records identified the bill and read off the amount ($1,280.35) to the jury. As soon as that was done the following cautionary instruction was given (N. T. 483):

> "The Court: Members of the Jury, I told you you could only make a limited use of this.
>
> This is not an item of damage for Miss Pasceri. The recovery of that hospital bill is for some other proceeding in some other court. We have no jurisdiction over that in this court.
>
> I allowed it in only for one purpose, so that you could use that together with the testimony as to the length of the stay as an indication that she was not there for just a matter of rest; she was being treated. That is all.
>
> It is a very limited use that you can make of it and I caution you to consider it only in that light."

These instructions were repeated in the charge to the jury (N. T. 663-64). Plaintiff's counsel made no objection at either time, but now he asserts that plaintiff was prejudiced by the suggestion of other litigation. If he was, it was of counsel's own doing and he cannot be heard to complain now, particularly in the absence of objection as required by Rule 51, F. R. C. P. Schabo v. County of Mercer, State of N. J., 333 F. 2d 971 (3d Cir. 1964).

5. *Inadequacy of Verdict.*

Plaintiff asserts finally that the amount of this verdict was inadequate; that it was obviously a compromise, brought about by confusion in the minds of the jury as to defendant's negligence; that the confusion was created by the court's charging on the emergency doctrine when it had not been requested to do so.

Whether requested or not, it is the court's responsibility to give instructions on matters raised in the course of the trial. In his closing speech, defense counsel had alluded to the circumstances which might have caused defendant, while passing another car, to cut in sharply and run off the road, intimating that defendant may have been confronted with an emergency which caused the sudden swerving (N. T. 618-19). The court's charge (N. T. 662-63) was given to eliminate any confusion that might have been thus created in the minds of the jury as to the proper application of the emergency doctrine. The purpose was to make clear that defendant could not be absolved for actions taken in the face of an emergency if the emergency was created by his own carelessness. The instructions on emergency were repeated when the jury returned for additional instructions on negligence. Certainly after the additional instructions, there could be no lingering doubt in the minds of the jury on the liability phase. There is no support,

therefore, for counsel's assertion that the verdict reflected a compromise of doubtful liability.

Finally, as to the size of the verdict, counsel expresses shock at the low amount. Frankly the size of the verdict was not especially surprising. There were no special damages of any kind before the jury—no loss of wages, no hospital or medical expenses past[4] or future.[5] The full amount of the verdict was for compensation for the injuries, the pain, suffering, inconvenience and discomfort; the deformity; and the effects upon Miss Pasceri's child bearing capacity. On this last, the evidence was by no means one sided. There were serious conflicts in the medical evidence as to the effect of the admitted pelvic and internal injuries upon that function. The extent of the impairment and the dollar amount to compensate for that and all the other effects of the injuries were matters peculiarly for the jury. The $25,000 verdict was within a predictable range for a jury's verdict.[6] I cannot say it was inadequate; it certainly does not shock my conscience.

The motion for new trial will be denied.

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4. See discussion, supra.

5. Plaintiff complains that the matter of future medical expenses was not submitted to the jury. Plaintiff presented no evidence as to the likelihood of the need for medical services in the future, or the nature of the services, cost, duration, etc.

6. In recommending a somewhat higher figure in settlement (which plaintiff rejected) the court ventured its opinion as to the expectable range of the jury's verdict. This verdict was within that range.